

ORAL ARGUMENT HELD NOVEMBER 6, 2017
CASE NO. 16-1309

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

VOLKSWAGEN GROUP OF AMERICA
CHATTANOOGA OPERATIONS, LLC,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW FROM
ORDER OF THE NATIONAL LABOR RELATIONS BOARD

**PETITIONER'S NOTICE OF NON-OPPOSITION
TO THE NATIONAL LABOR RELATIONS BOARD'S
MOTION TO REMAND**

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF
APPEALS FOR THE D.C. CIRCUIT:

Petitioner Volkswagen Group of America, Inc. ("Volkswagen"), by its undersigned counsel, files this notice of non-opposition to the National Labor Relations Board's ("NLRB's") Motion to Remand (Doc. #1709613) ("Motion") and states:

1. On December 15, 2017, the NLRB decided *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017). As the NLRB stated in its Motion, *PCC Structural* overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357

NLRB 934 (2011), on which the bargaining unit determination at issue in this appeal was based. (Doc. #1709613 at ¶¶3, 4).

2. Because the NLRB has changed the policy underlying the decision at issue in this appeal, the Supreme Court has held that a remand to the agency is the proper course of action. *See NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 n.10 (1974) (remanding case to NLRB where an intervening NLRB decision appeared to change the policy underlying the issue on appeal).

3. This Court previously has followed *Food Store Employees* in cases involving intervening changes in agency policies. *See Panhandle Eastern Pipe Line Co. v. FERC*, 890 F.2d 435, 438-39 (D.C. Cir. 1989) (remanding case to FERC after FERC revised applicable legal norm during pendency of appeal); *see also D&F Afonso Realty Trust v. Garvey*, 216 F.3d 1191, 1193 n.1 (D.C. Cir. 2000) (stating that the FAA should interpret its new policy in the first instance).

4. Other circuits have followed this rule as well, including in a case where the issue was whether the employer had a duty to bargain following an election. *See, e.g., NLRB v. Coca-Cola Bottling Co. of Buffalo*, 55 F.3d 74, 78 (2d Cir. 1995) (remanding case to the NLRB after the NLRB set new policy during pendency of appeal); *Certainfeed Corp. v. NLRB*, 714 F.2d 1042, 1059-60 (11th Cir. 1983) (remanding case to the NLRB following intervening change in policy); *Cedar Coal Co. v. NLRB*, 678 F.2d 1197, 1199 (4th Cir. 1982) (same);

Presbyterian/St. Luke's Medical Ctr. v. NLRB, 653 F.2d 450, 457 n.6 (9th Cir. 1981) (same); *Blackman-Uhler Chem. Div. v. NLRB*, 561 F.2d 1118, 1119 (4th Cir. 1977) (en banc) (per curiam) (remanding case to the NLRB where there was an intervening change in NLRB law regarding election conduct while certification test pending).

WHEREFORE, in light of the controlling case law discussed above, Volkswagen does not oppose the NLRB's Motion to Remand this case to the NLRB due to its decision in *PCC Structural*s.

Dated: December 20, 2017.

Respectfully submitted,

LITTLER MENDELSON, P.C.
Attorneys for Petitioner

By: /s/ Arthur T. Carter

Arthur T. Carter
2001 Ross Ave., Suite 1500
Dallas, Texas 75201
T: (214)880-8105
F: (214)594-8601
atcarter@littler.com

A. John Harper III
1301 McKinney St., Suite 1900
Houston, Texas 77010
T: (713)652-4750
F: (713)513-5978
ajharper@littler.com

Maurice Baskin
815 Connecticut Ave., N.W.
Washington, D.C. 20006
T: (202) 772-2526
F: (202) 318-4048
mbaskin@littler.com

CERTIFICATE OF COMPLIANCE

1. This notice of non-opposition complies with the type-volume limitation of Fed. R. App. P. 27(a)(2)(B) because it contains 419 words, not including any accompanying documents exempted by Fed. R. App. P. 27(a)(2)(B) and Circuit Rule 27.

2. This notice of non-opposition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman Font 14.

3. This notice of non-opposition complies with the requirement of Circuit Rule 27(a)(4) because a certificate of parties and a disclosure statement have been filed previously with the Court.

/s/ Arthur T. Carter
Arthur T. Carter

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2017, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending electronic notification of such filing to all parties or their counsel of record.

Joel Abraham Heller
Jill A. Griffin
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Matthew James Ginsburg (Intervenor)
United Auto Workers, Local 42
815 Sixteenth Street, NW
Washington, DC 20006

Blair Katherine Simmons (Intervenor)
United Auto Workers, Local 42
8000 East Jefferson Avenue
Detroit, Michigan 48214

/s/ Arthur T. Carter
Arthur T. Carter

Firmwide:151890161.1 075690.1016